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Damage Control: Statutory Caps on Medical Malpractice Claims, State Constitutional Challenges, and Texas' Proposition 12

Michael J. Cetra

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I. INTRODUCTION

In September of 2003, the State of Texas made constitutional history: it became the first state to pass a constitutional amendment specifically empowering its state legislature to limit damage awards in medical malpractice lawsuits.[1] How did medical malpractice awards become so important that a state would find it necessary to specifically address the issue in its constitution? This paper will explore the history behind malpractice awards and the problems they created with insurance coverage; how states attempted to remedy the problem with statutes; and why Texas' amendment marks a new direction in this area in which voters will be called upon to settle the medical malpractice debate once and for all.

From the inception of problems regarding the price and availability of medical malpractice insurance, brought about by huge jury awards in malpractice lawsuits, most states attempted to pass some form of statutory caps on damages in medical malpractice lawsuits in an attempt to stabilize insurance rates. However, continued challenges by plaintiffs, on various state constitutional grounds, have left such statutorily-imposed caps on shaky ground. Courts have split on whether such caps are constitutional, and this has left doctors and group health care providers in a continued state of uncertainty. Proposals to amend state constitutions to address this issue, like the one passed in Texas, promise to finally put this issue to rest.

Well-informed voters will see the merits of placing caps on non-economic damages,[2] and they will continue to vote in favor of con-

1. Jill Wechsler, *States Tackle Healthcare Issues; Pulse on Policy; Government Actions and Their Impact for Drug Decision-Makers*, 38 FORMULARY 607 (2003). *See also* Kris Axtman, *Texas Vote Tests a New Tactic to Curb Jury Awards* (Sept. 2003), *available at* http://www.csmonitor.com/2003/0912/p02s02-uspo.html (on file with author).

2. Nixon & Nelson, *Capping Non-Economic Damages in Medical and Other Liability Cases*, Texas House Research Organization Report on Proposition 12, at 32. "Non-economic damages generally cover pain and suffering and similar losses, as opposed to economic damages such as compensation for lost wages or medical bills." *Id.*

stitutional amendments authorizing their state legislatures to pass such caps. Those states that do not succeed in amending their state constitutions will continue to suffer with the instability and uncertainty in the area of insurance rates for medical care providers because insurance companies fear huge jury awards for non-economic (i.e., pain and suffering) damages. State constitutional amendments provide a viable solution to stabilizing this area, and they promote the general health and well-being of the public without hampering the ability of injured plaintiffs to collect economic damages (i.e., lost wages and costs for medical bills).

II. EMERGENCE OF THE PROBLEM AND STATES' ATTEMPTS TO APPLY A QUICK FIX

In the 1970's, an explosion of medical malpractice lawsuits created an insurance crisis in the health care industry. Many private insurance carriers left the market because of the rise in claims and the accompanying increase in costs associated with defending against them. This situation left individual doctors and group health care providers in many states with only a scarce supply of insurance carriers from which to choose.[3]

In the early to mid-1980's, the problem turned from one of availability into one of affordability. In general, the insurers remaining from the carrier exodus of the 1970's continued to write policies for health care professionals, but they began charging high premiums that many physicians could not afford to pay.[4]

Today, the question of whether to limit awards in medical malpractice cases continues to be a hotly debated one as many states continue to face problems regarding availability and affordability of professional liability insurance for health care providers.[5] For instance, in March of 2003, the American Medical Association identified eighteen states in which medical liability has reached "crisis proportions." These states include: Florida, Pennsylvania, New Jersey, New York, and Ohio.[6] The American Medical Association identified an additional 26 states that show indications of "a serious and worsening situation" in regards to medical liability

3. Insurance Information Institute, *Hot Topics & Insurance Issues: Medical Malpractice* (Sept. 2003), *available at* http://www.iii.org/media/hottopics/insurance/medicalmal (on file with author).

4. Michelle M. Mello et al., *The New Medical Malpractice Crisis*, 348 NEW ENG. J. MED. 2281-82 (2003).

5. *Id.* at 2281-84.

6. Insurance Information Institute, *supra* note 3.

insurance.[7] In addition, physicians in West Virginia, New Jersey, Florida, Pennsylvania, Mississippi, Illinois, Texas, and Missouri have held or threatened work stoppages to draw attention to the high insurance premiums many doctors claim are driving them out of practice.[8]

Data compiled from jury awards across the nation supports the assertion that the costs associated with losing a medical malpractice lawsuit continue to increase. The average jury award in a medical malpractice case was $1 million in 2001, a 43% increase over the 1999 average of $700,000.[9] The largest jury award in 2001 was over $131 million, which represents the largest such award in the six years leading up to 2001.[10]

From the inception of concerns in the healthcare profession brought about by skyrocketing claims and jury awards in medical malpractice lawsuits, virtually every state in the United States enacted some sort of statutory reform to attempt to stem the flow of claims being brought against individual physicians and hospitals.[11] However, these statutes immediately faced, and those still intact continue to face, several challenges from plaintiffs. Plaintiffs attacking statutory caps assert that such caps violate various provisions of plaintiffs' respective state constitutions, including equal protection, right to a jury trial, access to the courts, and due process.[12] The cases in this area are voluminous, and such statutorily-imposed caps have been met with varying responses in state courts. Ultimately, even in states that have upheld such caps, their validity and enforceability generally rest on unstable ground, and this helps to explain the continued uncertainty—for plaintiffs, physicians, insurance companies, and lawyers—in this area. It also highlights the need for constitutional amendments to settle this issue once and for all.

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7. Mello, *supra* note 2.
8. *Id.*
9. Insurance Information Institute, *supra* note 3.
10. *Id.*
11. Insurance Information Institute, *supra* note 3. West Virginia was the only state that did not pass any sort of tort reform regarding medical malpractice claims. *Id.*
12. Mark D. Hiatt, *Caps on Damage Awards in Medical Malpractice Cases: Constitutional Challenges* (2002), *available at* http://aapsonline.org/jpands/hacienda/hiatt1.html (on file with author).

III. CASE IN POINT: *GOURLEY V. NEBRASKA METHODIST HEALTH SYSTEM*

Gourley v. Nebraska Methodist Health System,[13] a Nebraska case, provides a perfect example of the typical state constitutional challenges plaintiffs mount against the enforcement of a statute intended to cap jury awards in malpractice lawsuits. This case also shows how one state supreme court has grappled with the issues presented by such challenges.

In this case, the Gourleys, parents of a child born with brain damage, brought a medical malpractice action against their obstetrician-gynecologist, Dr. Knolla, her employer, OB/GYN Group, and Nebraska Methodist Hospital for allegedly negligent pre-natal care.[14]

During her pregnancy, Mrs. Gourley was under the care of Dr. Knolla, an obstetrician-gynecologist employed by the OB/GYN Group. During the thirty-sixth week of her pregnancy, Mrs. Gourley informed Dr. Knolla that she noticed less movement from the twin fetuses she was carrying, but Knolla assured her that everything appeared to be fine.[15] After two more days had passed, Mrs. Gourley called the OB/GYN Group and expressed continued concerns. She returned to OB/GYN group the same day and was instructed by another OB/GYN Group physician, Dr. Dietrich, to proceed for additional examination at Nebraska Methodist Hospital.[16]

During this examination, it was determined that the twins would have to be delivered via an emergency cesarean section. The operation was performed and two twin boys, Colin and Connor, were born.[17] Colin was born with brain damage and currently suffers from cerebral palsy and several related physical, cognitive, and behavioral health problems.[18]

The Gourleys' malpractice suit claimed that Knolla, OB/GYN Group, and Nebraska Methodist Hospital were jointly and severally liable for failing to properly monitor the pre-natal status of the twins. A jury determined that Knolla was 60% negligent and

13. 663 N.W.2d 43 (Neb. 2003).
14. *Gourley*, 663 N.W.2d at 55.
15. *Id.*
16. *Id.*
17. *Id.* at 56.
18. *Id.*

that the OB/GYN group was 40% negligent, and the total damages award came to $5,625,000.[19]

The trial court reduced the jury award in accordance with Nebraska's statute limiting jury awards in medical malpractice cases,[20] and entered judgment for the Gourleys, jointly and severally against Knolla and OB/GYN Group, for $1,250,000.[21] The Gourleys promptly filed a second motion for a new trial contending that the caps on damages imposed by section 44-2825(1) violated the Nebraska Constitution.[22]

After overruling a motion filed by Knolla and OB/GYN Group, the trial court reversed its original decision and held that the cap on damages in section 44-2825(1) violated the guaranty of equal protection under NEB. CONST. art. I, § 3,[23] and it also violated a plaintiff's right to a jury trial under NEB. CONST. art. I, § 6.[24] Thus, the trial court vacated its previous order and entered judgment for the Gourleys in the full jury verdict amount of $5,625,000.[25] Knolla and OB/GYN Group appealed to the Supreme Court of Nebraska, and the Gourleys filed a cross-appeal regarding the dismissal of Nebraska Methodist Hospital.[26]

With respect to the state constitutional issues of the trial court's ruling, Knolla and OB/GYN Group argued that the cap in section 44-2825(1) was constitutional and should have been applied to

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19. *Gourley*, 663 N.W.2d at 56. Nebraska Methodist Hospital was dismissed from the case after moving for a directed verdict at the close of the Gourleys' case-in-chief. The Gourleys moved for a new trial based on the dismissal of the hospital, but the trial court denied the motion. *Id.*

20. *Id.* NEB. REV. STAT. § 44-2825(1) (1998) of the Nebraska Hospital-Medical Liability Act caps recoverable damages in medical malpractice actions at $1,250,000. *Id.* at 55.

21. *Id.* at 56.

22. *Gourley*, 663 N.W.2d at 56. The Gourleys asserted that the statutory cap "violated their rights to (1) equal protection; (2) a jury trial; (3) an open court and full remedy; (4) substantive due process; and (5) life, liberty, and the pursuit of happiness." The Gourleys further argued that the cap was "unconstitutional special legislation." *Id.*

23. NEB. CONST. art. I, § 3 provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." NEB. CONST. art. I, § 3 (2003).

24. NEB. CONST. art. I, § 6 provides that "[t]he right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District [trial] Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury." NEB. CONST. art. I, § 6 (2003).

25. *Gourley*, 663 N.W.2d at 56.

26. *Id.* at 56-57.

limit the jury's $5.6 million award.[27] The Gourleys argued in support of the trial court's finding that section 44-2825(1) was unconstitutional by asserting that the statute violated: (1) special legislation, (2) equal protection, (3) open courts and right to a remedy, (4) right to a jury trial, (5) taking of property, and (6) separation of powers.[28] The Supreme Court of Nebraska noted that "[t]he Gourleys rely solely on provisions of the state [of Nebraska's] Constitution."[29] The Nebraska high court proceeded to address the Gourleys' constitutional contentions in turn.

a. Special Legislation

The Gourleys argued that section 44-2825(1) was unconstitutional special legislation because "it provide[d] a special privilege to health care professionals while placing a burden on the most severely injured plaintiffs."[30]

The court analyzed the special legislation clause of the Nebraska Constitution and concluded that its purpose was "the prevention of legislation which arbitrarily benefits or grants 'special favors' to a specific class."[31] The court went on to state that a legislative act will be deemed an unconstitutional act of special legislation, under the Nebraska Constitution, if it created an arbitrary method of classification or if it creates a permanently closed class.[32] The Supreme Court of Nebraska went on to note that a classification will be deemed constitutional when it is based upon public policy and the classification itself bears some reasonable relation to the subject legislation's goal of achieving that public policy interest.[33]

Ultimately, the court concluded that section 44-2825(1) was based upon legitimate public policy grounds and that the classifi-

27. *Id.* at 64. The Supreme Court of Nebraska addressed the state constitutional issues surrounding section 44-2825(1) after disposing of several procedural arguments raised by defendants Knolla and OB/GYN group. *Id.*

28. *Id.*

29. *Gourley*, 663 N.W.2d at 64.

30. *Id.* at 65. NEB. CONST. art. III, § 18 provides in pertinent part:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say . . . [G]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . [I]n all other cases where a general law can be made applicable, no special law shall be enacted.

NEB. CONST. art. III, § 18 (2003).

31. *Gourley*, 663 N.W.2d at 65.

32. *Id.* (quoting Bergan Mercy Hosp. Sys. v. Haven, 620 N.W.2d 339 (Neb. 2000)). The court found that the instant case did not involve a permanently closed class. *Id.*

33. *Id.* at 65-66 (citations omitted).

cation was reasonably related to those grounds, and therefore, the cap did not constitute prohibited special legislation.[34] The court examined the legislative history behind the passage of the Nebraska Hospital-Medical Liability Act and found the Nebraska State Legislature's specific findings and intent to provide adequate public policy justifications:

> The intent of [the Nebraska Hospital-Medical Liability Act] is to serve the public interest by providing an alternative method for determining malpractice claims in order to improve availability of medical care, to improve its quality and to reduce the cost thereof, and to *[e]nsure the availability of malpractice insurance coverage at reasonably rates*.[35]

b. Equal Protection

The Gourleys next contended that the cap violated the equal protection clause of the Nebraska Constitution, and that the court should apply some sort of heightened level of review in striking it down.[36]

The Supreme Court of Nebraska found that "[since] the interests at issue are economic, we apply the rational basis test."[37] The court held that section 44-2825(1) satisfied the rational basis test because "[r]educing health care costs and encouraging the provision of medical services are legitimate goals which can reasonably be thought to be furthered by lowering the amount of medical malpractice judgments."[38] Finding the rational basis test met, the Supreme Court of Nebraska concluded that the cap on damages satisfied equal protection.

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34. *Id.* at 69-70.

35. *Gourley*, 663 N.W.2d at 69 (quoting NEB. REV. STAT. § 44-2801 (1998)) (emphasis added).

36. *Id.* at 70-71. *See* NEB. CONST. art. I, § 3, *supra* note 22.

37. *Id.* at 71.

> Under the rational basis test, the Equal Protection Clause is satisfied as long as there is (1) a plausible policy reason for the classification, (2) the legislative facts on which the classification is apparently based may rationally have been considered to be true by the decision-maker, and (3) the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Id. (quoting Pfizer v. Lancaster Cty. Bd. of Equal., 616 N.W.2d 326 (Neb. 2000)).

38. *Id.* at 72 (referencing Evans ex rel. Kutch v. State, 56 P.3d 1046 (Alaska 2002)).

39. NEB. CONST. art. I, § 13 provides in pertinent part that "[a]ll courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay." NEB. CONST. art. I, § 13 (2003).

c. Open Courts and Right to Remedy

The next argument advanced in support of finding section 44-2825(1) unconstitutional was that it violated the open courts provision of the Nebraska Constitution and denied injured parties their right to a remedy.[39] The Gourleys argued that their action existed at common law, and as such, it was shielded from statutory modification because "common law rights and remedies that were in place at the time the [Nebraska] constitution was adopted are protected from legislative change."[40]

The court quickly disposed of this argument by first noting that the common law of England was adopted by statute in the state of Nebraska, and therefore, it existed by legislative enactment and may be repealed or altered.[41] Also, the court concluded that even if the Gourleys' common law argument was completely valid, section 44-2825(1) would still pass constitutional muster because it "does not bar access to the court or deny a remedy, [but] [i]nstead it redefines the substantive law by limiting the amount of damages a plaintiff can recover."[42]

d. Right to a Jury Trial

The Gourleys' next assertion in support of the trial judge's holding was that the statutory cap violated their right to a trial by jury.[43] Defendants Knolla and OB/GYN Group counter-argued that if the Legislature is authorized to abolish a common-law cause of action, then it must also have the power to limit the amount of damages recoverable in such an action.[44]

Besides agreeing with the defendants' argument in finding that plaintiffs' right to a jury trial was not violated by application of section 44-2825(1), the Nebraska high court also stressed that "[t]he remedy is a question of law, not fact, and it is not a matter to be decided by the jury."[45]

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40. *Gourley*, 663 N.W.2d at 73.
41. *Id.* at 74 (referencing NEB. REV. STAT. § 49-101 (Reissue 1998)).
42. *Id.* (citation omitted).
43. *See* NEB. CONST. art. I, § 6, *supra* note 24.
44. *Gourley*, 663 N.W.2d at 74-75.
45. *Id.* at 75 (citations omitted).

e. Separation of Powers

The last constitutional challenge the Gourleys asserted before the Nebraska high court was that section 44-2825(1) violated the separation of powers provision of the state's constitution.[46] The theory behind their argument was that the cap acted as a legislative judgment on damages, effectively interfering with a power reserved for the judiciary.

The Supreme Court of Nebraska concluded that the cap did not act as a legislative judgment on damages or otherwise violate principles of separation of powers.[47] First, the court stated that the cap in no way required the legislature to review specific disputes or determine the amount of damages. The court wrote: "Instead—without regard to the facts of a particular case—the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy."[48] Concluding that this was a proper legislative function, the court dismissed the Gourleys' final state constitutional argument against the constitutionality of section 44-2585(1).[49]

f. Final Disposition in Gourley: More Than Meets the Eye

The Supreme Court of Nebraska found the statutory cap prescribed by section 44-2825(1) to be constitutional, and therefore, the trial court's order finding that it was unconstitutional was reversed, and the trial court was ordered to reinstate the award to the Gourleys at the capped amount of $1,250,000.[50] However, this 5-2 per curiam opinion,[51] with numerous concurrences and dissents, indicates a court that is "sharply divided" on this issue,

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46. NEB. CONST. art. II, § 1 provides that "[t]he powers of the government of this state are divided into three distinct departments, the legislative executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." NEB. CONST. art. II, § 1 (2003).

47. *Gourley*, 663 N.W.2d at 77.

48. *Id.*

49. *Id.* The remainder of the majority opinion dismissed the Gourleys' cross-appeal in regards to the trial court's dismissal of Nebraska Methodist Hosp. as a co-defendant. *Id.* at 77-78.

50. *Id.* at 78.

51. A per curiam opinion is defined as "[a]n opinion handed down by an appellate court without identifying the individual judge who wrote the opinion." BLACK'S LAW DICTIONARY 896 (7th ed. 1999).

which "suggests that the cap remains vulnerable despite the ruling."[52]

It is particularly noteworthy that the Gourleys did not raise the issue of due process in their arguments and briefs before the Supreme Court of Nebraska despite the fact that they raised it in the lower court.[53] There was no indication or explanation of why the due process claim was not raised on appeal. In his concurrence, Justice Gerrard makes this point and indicates that if due process had been raised on appeal, then he would have voted to strike down the cap:

> In my view, this question when placed in its proper constitutional framework, implicates the constitutional right to substantive due process of law. There is a substantial overlap between the tests applied under due process and equal protection analysis. The distinction is that equal protection and special legislation analyses are focused on the classes created by a statute and whether there is justification for making such classifications and treating those classes differently. Due process, on the other hand, questions the justification for abrogating a particular legal right, and the appropriate scrutiny is determined by the importance of the right that is at issue. Thus, while the act does not create suspect classifications, and there may be some rational basis for treating health care tort-feasors differently from other tort-feasors, whether economic damages may be taken from negligently injured persons is a separate issue and calls for a different constitutional analysis. Because my concerns regard the nature of the basic right that has been taken—the right to recover proven economic damages—those concerns are properly addressed by a due process analysis.[54]

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52. Andrews Publications, *Nebraska Supreme Court Upholds State's Cap on Med-Mal Awards*, 4 ANNHLI 12, at 7 (June 2003).

53. *Gourley*, 663 N.W.2d at 85 (Gerrard, J., concurring). "The parties in this case have not presented the question whether the act, as applied, violates substantive due process, and I agree with the per curiam opinion's determination that we should not overthrow a legislative enactment on the basis of authority not raised and argued by the parties." *Id.* (Gerrard, J., concurring).

54. *Id.* at 83 (Gerrard, J., concurring). Justice Gerrard noted in his concurrence that although the majority of states with caps still intact limit only non-economic damages, the Nebraska cap covers both economic and non-economic damages. *Id.* at 81 (Gerrard, J., concurring).

Nebraska Chief Justice Hendry indicated in his concurring/dissenting opinion that he agreed with Justice Gerrard's due process analysis.[55]

Justice McCormack wrote a blistering concurrence/dissent in which he concluded that Nebraska's statutory cap violated both the constitutional provisions of due process and special legislation.[56] Regarding special legislation, Justice McCormack opined that:

> The cap grants a privilege to all health care providers whose negligence causes catastrophic damages, i.e. damages in excess of $1,250,000, because they are liable for less than 100 percent of the damages they cause. The general class standing in the same relation to these health care providers is all other professional [health] services providers who commit malpractice and cause catastrophic damages and who are liable for 100 percent of the damages they cause...[Y]et the Legislature has chosen to provide a benefit to one subset of the general class by exempting those health care providers whose negligence causes damages in excess of $1,250,000 from full liability for their negligent actions. Thus, I conclude that the cap is unconstitutional special legislation in violation of Neb. Const. art. III, § 18.[57]

On the issue of due process, Justice McCormack agreed with Justice Gerrard and stated he would also have found the cap unconstitutional as a violation of substantive due process had the parties raised and argued that provision of the Nebraska Constitution.[58] Justice Carlson also filed a concurrence/dissent in which he stated that he would have struck the cap down on both special legislation and substantive due process grounds.[59]

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55. *Id.* at 86-87 (Hendry, C.J., concurring in part, dissenting in part). Beyond agreeing that the cap was open to attack on due process grounds, C.J. Hendry also indicates that he might find section 44-2825(1) to be an unconstitutional act of special legislation if a "proper party" with a "proper record" brought such a challenge. *Id.* (Hendry, C.J., concurring in part, dissenting in part).

56. *Gourley*, 663 N.W.2d at 87-96 (McCormack, J., concurring in part, dissenting in part). Justice McCormack concurred with the per curiam opinion regarding defendants' procedural challenges and the Gourley's cross-appeal challenging the dismissal of Nebraska Methodist Hosp. as a co-defendant. *Id.* at 87 (McCormack, J., concurring in part, dissenting in part).

57. *Id.* at 91-92 (McCormack, J., concurring in part, dissenting in part).

58. *Id.* at 92 (McCormack, J., concurring in part, dissenting in part).

59. *Id.* at 97 (Carlson, J., concurring in part, dissenting in part).

The concurrences and dissents in *Gourley* indicate just how contentious the decision was. If the Gourleys had raised substantive due process in the appeal, then the Supreme Court of Nebraska would have most likely voted 4-3 to strike down the cap instead of the 5-2 opinion upholding it. Furthermore, two justices, Stephan and Miller-Lerman, did not participate in the decision,[60] and it is quite possible that their votes could have affected the outcome of the case.

Gourley is just a recent example from a single state that shows the uncertainty and instability that many statutorily-based caps rest upon. Not only was there a difference of opinion between the trial court and the high court, but even more importantly, there was a difference of opinion among the Supreme Court of Nebraska justices. Beyond showing the intrastate disagreement regarding statutory medical malpractice caps, *Gourley* also highlights the splits among and within the states.

IV. BEYOND GOURLEY: CONFLICTING STATE VIEWS

Throughout the *Gourley* opinion, there are several mentions of the disagreements among states when it comes to accepting or rejecting medical malpractice caps as constitutional. In regards to challenges based on special legislation provisions, the *Gourley* majority noted that "other states have also expressed agreement that a cap on damages for medical malpractice does not constitute special legislation."[61] Besides the Nebraska Supreme Court, other state high courts have found that caps do not constitute special legislation under their own constitutions, including Virginia[62] and Idaho.[63] However, a majority of the Supreme Court of Illinois has held that such caps amount to unconstitutional special legislation.[64]

In regards to challenges based on equal protection, "[a] majority of jurisdictions apply a rational basis or other similar test and determine that a statutory cap on damages does not violate equal protection."[65] These states include West Virginia,[66] Louisiana,[67]

60. *Gourley*, 663 N.W.2d at 78.
61. *Id.* at 69-70 (citations omitted).
62. *See generally* Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525 (Va. 1989).
63. *See generally* Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115 (Idaho 2000).
64. *See generally* Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).
65. *Gourley*, 663 N.W.2d at 71.
66. *See generally* Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991).
67. *See generally* Butler v. Flint Goodrich Hosp., 607 So. 2d 517 (La. 1992).

and Colorado.[68] Also, in 2002, the Michigan Court of Appeals found that statutory caps do not violate equal protection,[69] but the Supreme Court of Michigan has granted an appeal of this decision that is currently pending.[70]

In contrast to the above decisions, a minority of state courts have applied a heightened standard of scrutiny under their own equal protection provisions and determined statutory caps to be unconstitutional.[71] These states include New Hampshire[72] and North Dakota.[73]

The majority of courts addressing plaintiffs' challenges based on the open courts and right to remedy provisions of their respective state constitutions have held that caps on damages are constitutional.[74] These states include West Virginia,[75] Maryland,[76] Indiana,[77] and New Mexico.[78] The minority of courts who take the opposing view include South Dakota[79] and Texas.[80]

In regards to whether caps on damages violate a plaintiff's right to a jury trial under state constitutional provisions, courts are split, but the majority hold that a cap does not violate the right to trial by jury.[81] Some of the states that do not find a constitutional violation are Colorado,[82] Idaho,[83] and Alaska.[84] State high courts that have determined that a damages limit does violate a plaintiff's right to a jury trial include Washington[85] and Alabama.[86]

Regarding separation of powers provisions of state constitutions, some courts "have determined that a cap on damages does

68. *See generally* Scholz v. Metro. Pathologists, P.C., 851 P.2d 901 (Colo. 1993) (en banc).

69. *See* Phillips v. Mirac, Inc., 651 N.W.2d 437 (Mich. Ct. App. 2002).

70. *See* Phillips v. Mirac, Inc., 664 N.W.2d 223 (Mich. 2003). "Application for leave to appeal from the June 7, 2002 decision of the Court of Aplpeals [sic] is GRANTED limited to the issues [of] whether 257.401(3) constitutes an unconstitutional denial of plaintiff's right to a jury trial, equal protection, or due process." *Id.*

71. *Gourley*, 663 N.W.2d at 71.

72. *See generally* Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

73. *See generally* Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

74. *Gourley*, 663 N.W.2d at 73.

75. *See generally Robinson*, 414 S.E.2d at 877.

76. *See generally* Murphy v. Edmonds, 601 A.2d 102 (Md. 1992).

77. *See generally* Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980).

78. *See generally* Trujillo v. City of Albuquerque, 965 P.2d 305 (N.M. 1998).

79. *See generally* Certification of Questions of Law, 544 N.W.2d 183 (S.D. 1996).

80. *See generally* Lucas v. U.S., 757 S.W.2d 687 (Tex. 1988).

81. *Gourley*, 663 N.W.2d at 75.

82. *See generally Scholz*, 851 P.2d at 901.

83. *See generally Kirkland*, 4 P.3d at 1115.

84. *See generally Evans*, 56 P.3d at 1046.

85. *See generally* Sofie v. Fireboard Corp., 771 P.2d 711 (Wash. 1989).

86. *See generally* Moore v. Mobile Infantry Ass'n, 592 So. 2d 156 (Ala. 1991).

not violate [such] principles."[87] Among these states are Virginia,[88] West Virginia,[89] and Alaska.[90] However, the Supreme Court of Illinois concluded "that the determination whether a verdict was excessive was a discretionary function of the trial court and that a cap on damages improperly delegated that function to the Legislature."[91]

As previously mentioned, the Supreme Court of Nebraska did not have the opportunity to decide whether the Nebraska statutory cap violated substantive due process notions, but the concurrences and dissents in *Gourley* indicate that a majority of the court who heard the case would have found the caps unconstitutional on due process grounds if the parties had raised and argued that constitutional provision.[92] Several other state courts that have had the opportunity to address the issue have "concluded that the right to recover damages for personal injury is essential, and caps on damages are subject to heightened judicial scrutiny in making constitutional determinations."[93] These states include Utah[94] and South Dakota.[95]

Based on the foregoing, it is obvious that there are clear disagreements among the states regarding the constitutionality of statutory caps on medical malpractice awards. These splits, based on several constitutional principles, further drive home the point that purely statutorily-based caps remain open to attack. This leaves injured patients, health care professionals, plaintiff's bar, and the defense bar on shaky ground. In a state where caps have been upheld, all it would take is a novel constitutional argument or a change in the membership of a state's supreme court to alter the outcome of any given decision in this area.[96]

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87. *Gourley*, 663 N.W.2d at 76.

88. *See generally Etheridge*, 376 S.E.2d at 525.

89. *See generally* Verba v. Ghaphery, 552 S.E.2d 406 (W. Va. 2001).

90. *See generally Evans*, 56 P.3d at 1046.

91. *Gourley*, 663 N.W. 2d at 76 (referencing *Best*, 689 N.E. 2d at 1057).

92. *Id.* at 80-97 (Gerrard, J., concurring, Hendry, C.J., concurring in part, dissenting in part, McCormack, J., concurring in part, dissenting in part, and Carlson, J., concurring in part, dissenting in part).

93. *Id.* at 84 (Gerrard, J., concurring).

94. *See generally* Condemarin v. Univ. Hosp., 775 P. 2d 348 (Utah 1989).

95. *See generally Matter of Certification*, 544 N.W. 2d at 183.

96. It is worth noting that California and a handful of other states have been the exception to the rule: California has had stability in this area through early-established precedent upholding the validity of their statutory caps on malpractice awards. California has capped non-economic damages by statute since 1975. *See* Insurance Information Institute, *supra* note 3.

V. ENTER PROPOSITION 12

Amid the mass amount of conflict and confusion the great number of states have faced regarding statutory attempts to cap medical malpractice awards, it was only a matter of time until necessity would mark a new direction in this area. Enter Texas. Enter Proposition 12.

In 1977, the Texas State Legislature passed the Medical Liability and Insurance Act. The purpose of this act was to limit non-economic damages in medical liability cases.[97] The cap was indexed at the Consumer Price Index and has increased from $500,000 in 1975 to approximately $1.3 million in 2003.[98]

The cap was intended to apply to damages in all medical malpractice cases, but the Texas Supreme Court ruled the cap unconstitutional except in wrongful death cases.[99] In *Lucas v. U.S.*,[100] decided in 1988, the Supreme Court of Texas held that a statutory limitation on medical malpractice for the purpose of reducing malpractice premiums was unconstitutional as violating TEX. CONST. art. I, § 13, the Open Courts doctrine,[101] which guarantees meaningful access to the courts.[102] This ruling took away most of the intended effectiveness of the statute, and it placed a constitutional roadblock in the way of any similar statutory provisions attempting to limit malpractice awards.

In June of 2003, Texas lawmakers enacted H.B. 4,[103] which caps non-economic damages in medical malpractice suits at $250,000 for all physicians or health care providers, and $250,000 for each health care institution, not to exceed $500,000 for all such institutions. This $750,000 cap applies regardless of the number of defendants.[104]

Knowing this statute would be subject to the same state constitutional challenges that limited the 1977 statutory cap, Texas

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97. Nixon & Nelson, *supra* note 2, at 32.

98. *Id.*

99. *Id.*

100. *Lucas*, 757 S.W.2d at 687.

101. TEX. CONST. art. I, § 13 provides in pertinent part that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13 (2003).

102. *Lucas*, 757 S.W.2d at 692; *see also* Nixon & Nelson, *supra* note 2, at 32.

103. H.B. 4 passed by large majorities in both the Texas House, 27 to 4 (87%), and in the Senate, 110 to 34 (76%). Richard J. Trabulshi, Jr., *Proposed Constitutional Amendment 12*, 66 TEX. B.J. 653 (2003).

104. Stephanie Levy, *Damages Setback in Texas; Caps Out in Missouri*, 29 ADVOCATE 9, at 1 (2003).

Governor Rick Perry, a Republican, began campaigning for a constitutional amendment that would specifically grant the Texas Legislature the power to limit damages in medical malpractice cases.[105] State Representative Joe Nixon (R-Houston), sponsored the legislation to put the amendment [that became Proposition 12] on the September 2003 statewide election ballot.[106]

Proposition 12 was hotly contested, and it pitted doctors against lawyers and Republican factions against Texas Democrats. More than $13 million was spent advertising for and against Proposition 12, and both sides organized massive campaigns in support of their respective positions.[107]

On September 13th, Texas voters went to the ballot boxes, and Proposition 12 passed by a slim margin. The final tally put out by the Texas Secretary of State showed 51% (750,077 votes) for the amendment and 49% (717,342 votes) against it.[108] Charles W. Bailey, Jr., president of the Texas Medical Association, praised the outcome, stating: "[T]he real winners of this election are the people of Texas who can be more certain that a doctor will be there for them when they're sick or injured."[109] On the other side of the battle, Deborah Hankinson, a former Texas Supreme Court justice who led the opposition to Proposition 12, focused on the narrow passage of the amendment. "Our message was the constitution and the people's rights under the constitution . . . [t]hat's clearly important to Texans as well," she stated.[110]

Upon passage, Proposition 12 became Art. III, § 66 of the Constitution of the State of Texas.[111] The pertinent portions of this constitutional amendment state:

> Notwithstanding any other provisions of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed

105. Janet Elliott, *Texans Pass Prop. 12 in Statewide Election*, HOUS. CHRON. (Sept. 19, 2003), *available at* http://www.chron.com/com/cs/CDA/story.hts/topstory/2097196 (on file with author).

106. *Id.*

107. *Id.*

108. Erica Pitzi, *Proposition 12 Passes by Narrow Margin* (Sept. 14, 2003), *available at* http://www.msnbc.com/local/kamr/M325323.asp?cp1=1 (on file with author).

109. *See* Elliott, *supra* note 104.

110. *Id.*

111. Products Liability Advisory, *Texas Amends its Constitution to Permit Statutory Caps on Non-economic Damages*, 176 P.L. ADVISORY 5 (2003).

> departure from an accepted standard of medical of health care or safety, however characterized, that is or other claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person. This subsection applies without regard to whether the claim or cause of action arises under or is derived from common law, a statute, or other law, including any claim or cause of action based or sounding in tort, contract, or any other theory or ay combination of theories of liability. The claim or cause of action includes a medical or health care liability claim as defined by the legislature.[112]

This amendment grants the Texas Legislature the specific authority to pass caps in malpractice cases and it appears to shore up any future challenges to the caps prescribed by H.B. 4.

This amendment is important, however, even beyond the state of Texas. It marks a historic new direction in this area. Unlike the previous three decades, that have produced continued battles and uncertainty over whether state legislatures could impose statutory caps without violating their respective state constitutions, Texas' Proposition 12 marked the first time that a state was able to successfully put the answer in the hands of the voters.[113] By voting in favor of Proposition 12, Texans gave their state legislature the specific authority to pass such caps without the traditional fears of the caps being attacked by plaintiffs with an array of state constitutional challenges. Where statutory caps were open to attacks and constant uncertainty, it would seem that the specific constitutional authorization provided by Texas' art. III, § 66 will establish, like it or not, a stable foundation in this historically volatile area. It also appears that other states will soon follow suit.

VI. OTHER STATES CONTEMPLATE CONSTITUTIONAL AMENDMENTS

It might be too soon to gauge the overall effects of Proposition 12's passage on other states, but there are certainly other state policymakers already looking to let the voters settle the medical malpractice cap debate once and for all.

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112. TEX. CONST. art 3, § 66 (2003).

113. *See generally* Axtman, *supra* note 1. *See also* Leona Siadek, *Medical Malpractice Liability Still on Center Stage*, THE DOCTOR'S ADVOC. (2003), *available at* http://www.thedoctors.com/publications/docadv/2003 (on file with author).

For instance, in Florida, Republicans and doctors have stepped up their efforts to place an amendment similar to the one in Texas on Florida's next statewide ballot. In August of 2003, Republican leaders, including Florida Representative and House Speaker Johnnie Byrd (R-Plant City) and Florida Representative Connie Mack (R-Fort Lauderdale), addressed a town meeting of Duval County doctors.[114] The town meeting focused on a drive to collect enough signatures to put a constitutional amendment on the Florida ballot in 2004 that would limit jury awards in malpractice suits.[115]

On April 1, 2003, Pennsylvania Governor Ed Rendell, a Democrat, set up a task force to make recommendations on reforming the medical malpractice liability system in Pennsylvania. Rendell stated: "[I]n parts of Pennsylvania, medical malpractice rates are among the highest in the nation and the state has been grappling with the problem for several years."[116] The panel was unable to reach a consensus regarding caps on pain and suffering damages, and "the state currently has no limit on non-economic damages."[117]

However, just days after the passage of the Texas amendment, advocates for physicians and malpractice insurers appeared at a state Senate Judiciary Committee hearing to urge Pennsylvania lawmakers to approve a $250,000 cap on non-economic damages in malpractice lawsuits.[118]

> The hearing marked the first step in a process to place a measure on the November 2004 ballot that would allow voters to vote on a cap on non-economic damages. The State Legislature must approve the measure in two consecutive sessions before the measure can appear on the ballot. If approved by voters, the state Legislature in 2005 would vote on the issue.[119]

Although the hearing appeared to be scheduled before the passage of the Texas amendment, the success of Proposition 12 in Texas

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114. John Snow, *Medical Malpractice Takes on Constitutional Look*, TAMPA BAY B.J. (Aug. 5, 2003), *available at* http://www.bizjournals.com.tampabay/stories/2003/08/04/daily 18.html (on file with author).

115. *Id.*

116. Insurance Information Institute, *supra* note 3.

117. *Id.*

118. American Health Line, *Headline: Malpractice: AHL Features Developments in Six States*, AM. HEALTH LINE (Sept. 26, 2003), as reported by the Pittsburgh-Post Gazette on Sept. 16, 2003 (on file with author).

119. *Id.*

surely provided cap supporters in Pennsylvania with additional ammunition.

In July of 2003, then Kentucky gubernatorial candidate and Representative Ernie Fletcher (R-Ky.), a doctor, called for an amendment to the Kentucky Constitution to allow caps on jury awards in medical malpractice lawsuits.[120] On November 4, 2003, Fletcher was elected governor of Kentucky by a 55% to 45% margin.[121]

Lastly, in October of 2003, Wyoming Governor Dave Freudenthal, a Democrat, proposed a constitutional amendment that would specifically authorize state lawmakers to pass legislation that would cap non-economic damages in malpractice lawsuits.[122] Wyoming's state constitution currently prevents passage of such caps. The Legislature must consider Freudenthal's proposed amendment, and if it is approved, it will appear on the November 2004 statewide ballot.[123]

VII. ANALYSIS

With the explosion of medical malpractice lawsuits that began in the 1970's, a crisis developed in the healthcare industry as affordable and available professional liability insurance became scarce in many states. Virtually every state proposed some form of statutory cap as a "quick fix" to the problem. However, *Gourley*, and a plethora of other cases like it, exemplify the split of opinion in state courts when these statutes are attacked on varying state constitutional grounds. It also evidences how unstable this area is. This has kept medical malpractice insurance in many states at a crisis point despite the existence of such statutes.

Passage of Texas' Proposition 12 points to a new direction and possibly a permanent solution to this problem: putting it to the voters to decide whether their state legislatures should be empowered to limit caps on malpractice awards. The slim passage of the

120. American Health Line, *Headline: Malpractice: AHL Highlights Developments in Nine States*, AM. HEALTH LINE (July 3, 2003), as reported by the Lexington Herald Leader on July 2, 2003 (on file with author).

121. Charles Wolfe, *Rep. Ernie Fletcher Elected Governor of Kentucky*, CHI. SUN TIMES (Nov. 4, 2003), *available at* http://www.suntimes.com/output/elect/07ky.html (on file with author).

122. American Health Line, *Headline: Malpractice: AHL Features Developments in Four States*, AM. HEALTH LINE (Nov. 7, 2003), as reported by the Associated Press and the Billings Gazette on Oct. 24, 2003 (on file with author).

123. *Id.*

Texas amendment shows just what a contentious issue malpractice caps are, and it raises questions as to whether this will truly "fix" the problem. Recent activities in states like Florida and Pennsylvania indicate that medical malpractice caps will ultimately be decided in the ballot boxes in many states. This is a positive move that provides hope that the problems that have loomed in this area will be settled once and for all.

Any notion that the federal government might weigh in on this issue was dashed on July 10, 2003, when the United States Senate killed legislation to limit non-economic damage recoveries in medical malpractice suits to $250,000. The legislation would have also capped punitive damages at the greater of $250,000 or twice the amount of economic damages.[124] The HEALTH Act, as it was dubbed, passed the House earlier in 2003, but it lost on the Senate floor in a 49-48 vote, with Republicans favoring it and Democrats opposing it.[125] Even if the federal legislation had passed, it would appear that it would have been subject to all of the constitutional attacks that make state statutory caps vulnerable. This drives home the notion that malpractice caps will continue to be settled on a state-by-state basis.

Supporters of caps on damages in medical malpractice awards generally advocate caps on non-economic damages. Arguments in support of such caps are that they will help to stabilize the availability and affordability of insurance rates for medical care providers in that more insurers will be willing to do business in states where there is no threat of juries returning a huge award for a plaintiff's pain and suffering. The increased availability and affordability of professional liability insurance will ultimately improve the price and quality of care that physicians and group health care providers will be able to provide.[126]

Opponents of caps, on the other hand, argue that state legislatures should not be given authority to restrict constitutionally protected access to relief in court when injured plaintiffs are seeking damages for their losses and pain. Further, opponents argue that there is no concrete proof that caps actually contribute to a reduction in rates on malpractice insurance.[127]

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124. Medical Malpractice Law & Strategy, *U.S. Senate Says No to Tort Reform Bill*, 20 MED. MAL. NEWS 9, at 6 (July 16, 2003).

125. *Id.*

126. *See generally* Nixon & Nelson, *supra* note 2, at 32-34.

127. *See id.*

Although both sides make valid points, it would appear that imposing limits on caps is a wise move for states to make. Although, as opponents point out, there is no overwhelming evidence that caps really help lower rates for medical malpractice insurance, there are some strong indications that they are helping in states that have solidly supported such caps. For instance, after Texas passed Proposition 12, the largest professional medical liability insurer in the state announced it would immediately roll back premiums by 12%, effective January 2004.[128] Further, California, a state whose high court has long held statutory caps constitutional, has consistently enjoyed lower insurance rates than the rest of the nation.[129] Thus, caps on damages in medical malpractice cases can help lower malpractice rates, but this can only happen in states where the constitutionality of such caps rests on a solid foundation. Since courts in the majority of states have been uncertain in this area, state constitutional amendments promise to give the needed finality and stability in this area. This stability can help lower insurance rates for medical providers and avert the "crisis" situation many states currently face.

VIII. CONCLUSION

The future of medical malpractice caps appears to rest in the hands of individual state voters. As more states follow Texas' lead and push for constitutional amendments in this domain, voters will be called upon to decide whether or not their respective state legislatures should have the power to limit jury awards in medical malpractice lawsuits. Well-informed voters will vote in favor of caps as a means to provide a level of stability and finality in this area. Once insurance carriers feel confident that awards for non-economic damages are truly limited, and that there is little danger of a huge jury verdict for pain and suffering being entered against them, these carriers will then begin to expand availability and affordability to physicians and group health care providers across the country. This will help end the "medical malpractice crisis" once and for all. States that do not follow the path of Texas only face continued instability and problems with doctors in their states finding affordable coverage. Legislators across the country should advocate specific amendments limiting non-economic dam-

128. Michael Romano, *Cooler in Texas?; Insurer Ready to lower malpractice premiums*, 33 MODERN HEALTHCARE CHICAGO 18 (Sept. 22, 2003).

129. Nixon & Nelson, *supra* note 2, at 33.

ages in medical malpractice lawsuits, and they should encourage their constituents to support and adopt these measures into their respective state constitutions.

Michael J. Cetra[*]

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